

## MANDATE

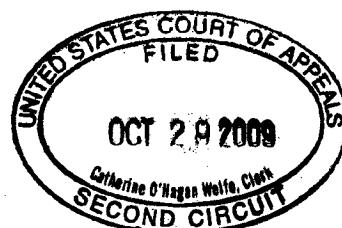
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUITBY SUMMARY ORDER DEPUTY CLERK

Sessions

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://WWW.CA2.USCOURTS.GOV/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

1 At a stated term of the United States Court of Appeals  
 2 for the Second Circuit, held at the Daniel Patrick Moynihan  
 3 United States Courthouse, 500 Pearl Street, in the City of  
 4 New York, on the 29<sup>th</sup> day of October, two thousand nine.

5  
 6 PRESENT: GUIDO CALABRESI,  
 7 RICHARD C. WESLEY,  
 8 Circuit Judges,  
 9 ALLYNE R. ROSS,  
 10 District Judge.\*



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 13  
 14 Timothy Keene, individually, and as next friend to K.K., a  
 15 minor by next friend K.K.,

16  
 17 Plaintiff-Appellee,  
 18

2:07-cv-79

19 v. 09-0872-cv

20  
 21 Daniel Schneider, Jared Hatch,

22  
 23 Defendants-Appellants.

24  
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 26  
 \*The Honorable Allyne R. Ross, of the United States  
 District Court for the Eastern District of New York,  
 sitting by designation.

NOV 19 2009

1 FOR PLAINTIFF-APPELLEE: MAGGIE VINCENT, Rubin, Kidney,  
2 Myer & DeWolfe, Barre, VT

3  
4 FOR DEFENDANTS-APPELLANTS: Assistant Attorney General  
5 DAVID CASSETTY, for William H.  
6 Sorrell, Attorney General,  
7 State of Vermont  
8 Montpelier, VT  
9

10  
11 Appeal from the United States District Court for the  
12 District of Vermont (Sessions III, J.).  
13

14 UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED,  
15 AND DECREED that the judgment of said District Court be and  
16 hereby is REVERSED:  
17

18 Appellants Daniel Schneider and Jared Hatch appeal from  
19 a denial of a summary judgment motion entered by the United  
20 States District Court for the District of Vermont (Sessions  
21 III, J.) on February 12, 2009. We assume the parties'  
22 familiarity with the underlying facts, the procedural  
23 history of the case, and the issues on appeal.

24 Typically, this court does not have jurisdiction to  
25 review a denial of summary judgment. *Escalera v. Lunn*, 361  
26 F.3d 737, 742 (2d Cir. 2004). Qualified immunity cases are  
27 the exception to the rule. *Id.* at 743. When a district  
28 court denies a summary judgment motion that is based on  
29 qualified immunity, this court may review the judgment "to  
30 the extent that the district court has denied the motion as  
31 a matter of law." *O'Bert ex rel. Estate of O'Bert v. Vargo*,

1 331 F.3d 29, 38 (2d Cir. 2003). A defendant may immediately  
2 appeal the denial if he adopts the plaintiff's version of  
3 the facts and argues that the plaintiff's version of the  
4 facts affords the defendant qualified immunity as a matter  
5 of law. *Id.* This court "may not review whether a dispute  
6 of fact identified by the district court is genuine." *Droz*  
7 *v. McCadden*, 580 F.3d 106, 108 (2d Cir. 2009) (internal  
8 quotation marks and citation omitted). Our review of the  
9 denial of summary judgment is *de novo*, and we accept all of  
10 the plaintiff's facts as true. *Savino v. City of New York*,  
11 331 F.3d 63, 72 (2d Cir. 2003).

12 Qualified immunity exists to protect government  
13 officials from liability for civil damages that arise from  
14 the reasonable execution of their official duties. *Pearson*  
15 *v. Callahan*, 129 S.Ct. 808, 815 (2009). A qualified  
16 immunity defense is available when "(a) the defendant's  
17 action did not violate clearly established law, or (b) it  
18 was objectively reasonable for the defendant to believe that  
19 his action did not violate such law." *Tierney v. Davidson*,  
20 133 F.3d 189, 196 (2d Cir. 1998). "Clearly established"  
21 means more than a generalized protection found within the  
22 constitution – the law in question must be particular enough

1 to give the government officials "fair warning" that their  
2 behavior is over the line. *Hope v. Pelzer*, 536 U.S. 730,  
3 740-41 (2002).

4 Excessive force is evaluated through Fourth Amendment  
5 doctrine, and we examine whether the force was excessive  
6 under an objective standard of reasonableness. *Stephenson*  
7 *v. Doe*, 332 F.3d 68, 77 (2d Cir. 2003). Even if the force  
8 is objectively unreasonable, an officer may still be  
9 eligible for qualified immunity if it was objectively  
10 reasonable for the officer to believe that her action did  
11 not violate clearly established law. *Salim v. Proulx*, 93  
12 F.3d 86, 89 (2d Cir. 1996). Qualified immunity protects  
13 officers "from the sometimes hazy border between excessive  
14 and acceptable force." *Brosseua v. Haugen*, 543 U.S. 194,  
15 198 (2004) (internal quotation marks and citation omitted).

16 When we examine officers' use of force, we must make  
17 "allowance[s] for the fact that the police officers are  
18 often forced to make split-second judgments - in  
19 circumstances that are tense, uncertain, and rapidly  
20 evolving - about the amount of force that is necessary in a  
21 particular situation." *Graham v. Connor*, 490 U.S. 386, 396-  
22 97 (1989). We assess those circumstances through careful

1 examination of the facts of the particular arrest,  
2 "including the severity of the crime at issue, whether the  
3 suspect poses an immediate threat to the safety of the  
4 officers or others, and whether he is actively resisting  
5 arrest or attempting to evade arrest by flight." *Id.* at  
6 396.

7 In this case, Plaintiff Timothy Keene ("Keene")  
8 concedes that the officers had probable cause to arrest him  
9 and that he resisted that arrest. He concedes that he  
10 refused multiple requests by the officer to place his hands  
11 behind his back. He concedes that he was repeatedly warned  
12 before Officer Schneider pepper sprayed him. He concedes  
13 that, once on the ground, he held his arms underneath him to  
14 prevent the officers from putting handcuffs on him. He  
15 states that he only released his arms when he heard his  
16 daughter tell him to.

17 The law is clearly established that officers may use  
18 reasonable force to effectuate an arrest. See *Muehler v.*  
19 *Mena*, 544 U.S. 93, 98-99 (2005). Under the circumstances,  
20 we find that the officers' use of force, which resulted in  
21 minimal injuries and stopped immediately after Keene was  
22 handcuffed, did not violate clearly established law.

1 Therefore, the officers were entitled to the qualified  
2 immunity defense, and the district court's denial of their  
3 motion for summary judgment was in error.

4 For the foregoing reasons, the decision of the district  
5 court is REVERSED and it is hereby ORDERED that judgment be  
6 entered in the district court in favor of the defendants on  
7 all federal claims.

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9 FOR THE COURT:  
10 Catherine O'Hagan Wolfe, Clerk  
11  
12 By: 